No. 87-253

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In The

Supreme Court of the United States

October Term, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

CHAN KENDRICK, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF CATHOLIC CHARITIES, U.S.A. AND THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES IN SUPPORT OF THE APPELLANTS

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CONSENT OF THE PARTIES

The parties to this case have consented to the filing of this brief. The original letters of consent have, pursuant to Rule 36.2 of the Rules of Practice of the Supreme Court, been presented to the Clerk of this Court.

IDENTIFICATION AND INTERESTS OF THE AMICI

The *amici* are national associations whose memberships actively deliver social and medical services to the general public on a non-discriminatory basis without regard to race, color or creed. Both of these organizations are comprised of institutions and individuals affiliated with the Roman Catholic Church. Many of the social and medical programs and services delivered by the members of these organizations are funded, at least in part, by federal and/or state monies. Moreover, member organizations of each association provide services under the Adolescent Family Life Act, 42 U.S.C. (Supp. III) 300z *et seq.* (AFLA) which is the subject of the instant case.

Thus, the *amici* represent organizations which have a substantial interest in the Constitutional issues presented by the instant matter. One of the organizations, Catholic Charities, USA, is itself a grantee under the AFLA program and has a direct as well as a representational interest in this case.

A. CATHOLIC CHARITIES, USA

Catholic Charities, U.S.A. (formerly National Conference of Catholic Charities) is a federation of organizations and individuals who carry out the Catholic Church's social welfare activities in the United States. Founded in 1910, Catholic Charities, U.S.A. consists of a nationwide network of 633 agencies and institutions and several hundred thousand volunteers and staff who provide services to, advocate for, and join forces with others to work for a just and peaceful society.

At the local level, Catholic Charities agencies offer

counseling for marital conflict, death, pregnancy, substance abuse, refugee resettlement, and problems related to youth and aging. Agencies also provide supportive assistance such as child care, pregnancy and adoption services, day care, respite care, nutrition and health, and emergency food and shelter.

Most of the Catholic Charities agencies which deliver social services are fully accredited by the Council on Accreditation of Services for Families and Children (COA) which is the largest comprehensive private accreditor of social and mental health services in North America. COA is sponsored by seven major service organizations: Association of Jewish Family and Children's Agencies, Catholic Charities, U.S.A., Child Welfare League of America, Family Service of America, Lutheran Social Service System, National Association for Homes for Children, and National Committee for Adoption.

The various Catholic Charities agencies, in like manner with human service programs of other denominational groups, sponsor programs for the needy and otherwise hurting individuals and families with the assistance of funds from a variety of governmental sources–federal, state, and local[1] Among the major federal programs which are the source of funds for part of the services offered by local Catholic charities and the other religious human services agencies are: the Emergency Food and Shelter Board of the Federal Emergency Management Agency, PL 99-500; the Older Americans Act, 42 U.S.C. 3001 *et seq;* Title XX of the Social Security Act, 42 U.S.C. Sec. 1397; the Job Training and Partnership Act, 29 U.S.C. 1501; Title XIX of the Social Security Act (Medicaid), 42 U.S.C. Sec. 1396i *et seq*; Title XVI of the Social Security Act (Medicare), 42 U.S.C. Sec. 1381 *et seq*; Title IVA and B and E of

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[1] Total income and in-kind contributions to Catholic Charities agencies was $634,859,539 in 1986.

the Social Security Act (Foster Care, Adoption of Hard-to-Place Children, Child Welfare Services), 42 U.S.C. Sec. 603; and other titles of the Social Security Act; the National Housing Act as amended, 12 U.S.C. Sec. 1701 *et seq*, including Sections 8 and 202; Community Development Block Grant, Emergency Shelter, 42 U.S.C. Sec. 5301 *et seq*; Low Income Energy Assistance Program, 42 U.S.C. Sec. 8621; the Refugee Act of 1980, 8 U.S.C. Sec. 1101, 1151-53, 1157-59, 1181-1182, 1253-4, 1521-24; the Immigration Reform and Control Act of 1986, PL-99-603 100 Stat 3359; the Juvenile Justice Act, 42 U.S.C. 5601 *et seq* including its runaway youth and homeless youth title, the Alcohol, Drug Abuse & Mental Health Grant, 21 U.S.C. 1001 et seq., the Child Abuse and Neglect Act, including the domestic violence title, 42 U.S.C. Sec. 5101 *et seq*; the Agricultural Adjustment Act of 1938 as amended, 7 U.S.C. Sec. 1281 *et seq* including the Agricultural and Consumer Protection Act of 1973, 7 U.S.C. Sec. 612c nt. and the Temporary Emergency Food Assistance Program of 1983, 7 U.S.C. Sec. 612c nt.

The most recent statistics show that in 1986, the Catholic Charities agencies throughout the United States provided services to over eight million individuals and to over two million families. These social services included counseling services, pregnancy services, adoption services, refugee resettlement and immigration services, socialization services, food services, emergency/crisis services, support services, housing services, out-of-home care services.

1. Counseling

In 1986, a total of 739,711 persons received counseling services through Catholic Charities agencies in the United States. These services were provided to children, adults, and aging persons. A total of 331,871 families were served during that period. The type of counseling services provided included individual counseling, family counseling, marital counseling, premarital counseling,

adolescent counseling, group counseling, peer counseling, hot line counseling, family abuse and violence counseling, alcohol/drug counseling, employment counseling, grief-loss counseling, pregnancy counseling, post-abortion counseling, counseling for AIDS victims, and family mediation services.

2. Pregnancy Services

Catholic Charities agencies provided pregnancy services for 73,061 individuals and 32,814 families during the year of 1986. These services included pregnancy testing, pre and post-natal care, maternal assistance to pregnant women, housing for pregnant women, and continued education for pregnant and parenting clients.

3. Adoption Services

A total of 44,022 individuals and 18,380 families were the recipients of adoption services through Catholic Charities in 1986. A total of 3,981 adoptions were completed in that year, almost 70% of these being special needs or "waiting" children. Seven hundred and four of these adoptions were international adoptions. The services provided include pre-adoption foster care placement, post-adoption services, infant adoption and services to adult adoptees.

4. Refugee Resettlement/Immigration Services

A total of 242,166 individuals and 90,863 families were the recipients of Catholic Charities Refugee Resettlement/Immigration Services during the year 1986. Among the services under the Refugee Resettlement and Immigration program were pre-reception preparation, unaccompanied minors, family reunification, language education, general education, employment services, health services, housing placement, and legal services.

5. Socialization/Supportive Services

A total of 529,927 individuals and 227,000 families were recipients of Socialization Services during 1986. These services are primarily supportive and include, *inter alia*, Summer Camp for Youth, Summer Camp for the Elderly, Neighborhood Centers, Big Sister and Big Brother Programs, Golden Age and Senior Center programs.

6. Food Services

The Food Service Program served over 3,000,000 individuals and 743,000 families in 1986. These services included soup kitchens, food banks, meals on wheels, and nutritional services.

7. Emergency/Crisis Services

The Catholic Charities served over 2,000,000 individuals and 652,764 families with Emergency/Crisis Services during the year 1968. These services included shelter for homeless adults and families, shelter for abused/neglected adults, shelter for runaway youth, emergency food services, emergency clothing, emergency medication, emergency housing services, emergency financial assistance, services for abused elderly, services for rape victims.

8. Support Services

In 1986, Catholic Charities agencies provided support services to 611,995 individuals and 238,915 families. These services included adult day care, child day care, hospice care, homemaker services, legal services, transportation services, job development, sheltered workshops, housing search, phone reassurance/friendly visits, independent living services, and home health care service.

9. Housing Services

During 1986, Catholic Charities agencies provided housing services to 75,656 individuals and 38,951 families. These services include housing units for the elderly, housing units for families, single room occupancy, and housing

units for the disabled.

10. Out-of-Home Care Services

During the year 1986, a total of 182,535 individuals (148,425 of these were children) and 119,547 families were recipients of Out-of-Home Care Services provided by Catholic Charities agencies. The services provided included those to physically and/or mentally disabled children, delinquent youths, adults who are dependent, neglected, abused, or emotionally disturbed, adults who are physically disabled or mentally disturbed, and finally, aged persons.

B. THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES

The Catholic Health Association of the United States (CHA) is a national service organization of Catholic hospitals and long-term care facilities, their sponsoring organizations and systems, and other health-related agencies and services operated as Catholic.

The Catholic Health Association is comprised of 614 member hospitals and 259 long-term care facilities. These health care facilities are located in each of the 50 states and care for more than 40,000,000 persons annually. These CHA member hospitals have approximately 170,000 beds which amounts to 16% of all the non-Federal short-stay hospital beds in the United States. The acute care hospitals admitted almost 2,000,000 Medicare patients in 1985. Medicaid admissions to such facilities in 1985 amounted to over half a million persons.

ARGUMENT

I.

This is an unique and important case because the decision of the lower court extends the application of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to sectarian social welfare organizations. This decision prohibits the funding of

a public social purpose where that is fulfilled through the work of non-profit organizations having sectarian affiliation. Heretofore, the impact of *Lemon* and its progeny has been restricted to the delivery of educational services. Unless the lower court's decision is reversed, the delivery of important social services will be jeopardized and curtailment of these services will hurt literally tens of millions of needy persons.

Substantial cause exists to warrant different treatment of sectarian related social welfare organizations in contrast to that which this Court has accorded to sectarian related educational institutions. In the first place, the grantees under the Adolescent Family Life Act, 42 U.S.C. (Supp. III) 300z *et seq.* (AFLA) are required to provide a professionally competent social service. The fact that the work involved deals with a matter of public morality does not convert this service into the teaching of religion. Secondly, there is a long uninterrupted history of cooperation between government and sectarian related institutions in the delivery of social services. This Court has in the past chosen not to utilize the *Lemon* test in dealing with instances of historical practice. See *Marsh v. Chambers*, 463 U.S. 738 (1983); *Walz v. Tax Commissioner*, 397 U.S. 420 (1970). Finally, there is ample legal precedent to support distinction of social services from educational services.

A.

Despite the rhetoric of both the appellees and the court below, this case does not involve the teaching of religion or religious indoctrination. The Adolecent Family Life Act, 42 U.S.C. (Supp. III) 300z *et seq.* (AFLA), provides in pertinent part that government funds will be available for demonstration projects in "prevention services" and/or "care services". The prevention services referred to here are professionally conducted counseling. Counseling, in the context of the delivery of social welfare services, is not

teaching.[2]

Secondly, the object of this counseling is not a religious tenet, or a doctrine peculiar to a religious sect or denomination. Rather, the focus of this program is clearly a matter of public concern and public morality. This fact is conceded by the court below. *Bowen v. Kendrick* 657 F. Supp. 1547, 1558 (D.D.C. 1987).

It is well settled as a matter of constitutional principle that the government may act to further a value judgment of public morality. *Maher v. Roe*, 432 U.S. 464, 474 (1977). Moreover, it is also well settled that a statute does not violate the Establishment Clause merely "because it happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

For example, in *Harris v. McRae*, 448 U.S. 297, 314 (1980), the Supreme Court stated, "That the Judaeo-Christian religions oppose stealing does not mean that a state or the federal government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* at 319. Likewise, the fact that the legislative purpose of the AFLA, which seeks to discourage adolescent premarital sexual activity, coincides with the traditional Judaeo/Christian view does not mean that the statute seeks to advance religion or that grantees under the program seek to "teach religion". 448 U.S. 297, 319 (1980).

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[2] "Counseling involves helping individuals or groups resolve social and personal problems through the process of developing a relationship, exploring the problem in depth and by exploring alternative solutions." Zastro, Charles *The Practice of Social Work*, (Dorsey Press, Homewood, Illinois, 1981) p. 13. *See also*, Rogers, Carl R., *On Becoming a Person*, (Houghton Mifflin Company, Boston, 1961,) pp. 276, 288. Biesteck, Felix, *The Case Work Relationship*, (Loyola Univ. Press, Chicago, 1957) pp. 100-119.

Advancement of public morality does not automatically become the "teaching of religion" simply because a sectarian related institution undertakes to carry out the program activity. Morality may indeed be a concern of organized religion, but the two are not identical. Moral belief and conduct can and, indeed, do exist independently of organized religion.

B.

The AFLA must be seen as an element of a larger mosaic created by the cooperation of the government and sectarian and other private institutions in the delivery of social services. Any judgment of the constitutionality of the AFLA must be made in the context of a long history.

The cooperative effort of government and organized religion in the delivery of social services is both long standing and complex. As noted above,[3] there are numerous federal statues and programs which presently utilize institutions with sectarian affiliation as instrumentalities in the delivery of social services. This relationship is not new; it dates to the early years of the Republic. Many of the early efforts to meet the needs of widows, orphans, and paupers were undertaken by sectarian institutions, especially in the urban areas. Because of the importance of these efforts to the local communities, such insitutions were the recipients of public funds. In New York State, for example, government assistance for the care of orphans and needy children by sectarian related institutions began as early as 1855.

> Beginning with 1855, the state began to appropriate a general grant of money in aid of private orphan asylums to be distributed through county officials among the various institutions on per capita basis. Chapter 538 of the laws of 1855 appropriated $35,000 to be distributed among the

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[3] See pp. 3-4 above.

> 'incorporated orphan asylums of the state'. The same amount was appropriated in 1856 and 1857.

Schneider and Deutsch, *History of Public Welfare in New York State 1867-1940*, (Univ. of Chicago Press, Chicago, 1941) pp. 338-339 (1941).[4]

The New York Catholic Protectory, which was established in 1863, and which became the largest single child care institution in the United States, was also the recipient of public assistance.[5] In 1875, the state granted per capita subsidies for the care of children who would otherwise be public charges.[6]

The Sisters of St. Joseph founded the Lecouteux, St. Mary's Institution for Deaf Mutes in 1859, at Buffalo, New York. After a period of struggle, the institution, a pioneer in efforts to improve the care and development of deaf mutes, became successful. As noted by Schneider and Deutsch, *History of Public Welfare, New York State, 1867 to 1940*, (Univ. of Chicago Press, 1941) at p. 371:

> In 1865, [the Institution] received $500 from the state in lump sum. State grants were made regularly for several years thereafter. The legislative enactments of 1871 and 1872 authorized (the Institution) to admit deaf mutes at the expense of town, county, or the state on the same basis operated with respect to the New York Institute.[7]

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[4] *See also, New York Laws of 1863*, Ch. 210; *New York Laws of 1864*, Ch. 401; *New York Laws of 1865*, Ch. 641; *New York Laws of 1866*, Ch. 774.

[5] *New York Laws of 1866*, Ch. 647; *New York Laws of 1864*, Ch. 401, 405; *New York Laws of 1871*, Ch. 83.

[6] Chancey, Alexander, "History of Social Work and Social Welfare-Significant Dates" (*Encyclopedia of Social Work*, 18th Ed., Vol. 1).

[7] *New York Laws of 1865*, Ch. 641; *New York Laws of 1856*, Ch. 774; *New York Laws of 1871*, Ch. 548; *New York Laws of 1872*, Ch. 670.

New York City, as well as the State of New York, made contributions to sectarian social welfare organizations throughout the 19th century. "At one time or other, almcst all private charities in New York City received some state or municipal patrɔnage." Mohl, Raymond, *Poverty in New York 1727-1825*, (Oxford Univ. Press, New York, 1971) at p. 151.

Cooperation between government and organized religion and the delivery of social services was not limited to New York. St. Mary's Industrial School for Boys, in Baltimore, Maryland, was partially funded by the State of Maryland and the city of Baltimore from 1869 to 1950.[8]

The State of Illinois also utilized services of sectarian institutions in carrying out social services. The Illinois Law of 1869, for example at p. 309, made appropriations for institutions sponsored by religious organizations.

The federal government also has a history of aiding the accomplishment of a public purpose where the effort is conducted under the auspices of religious organization. In 1897, Congress appropriated monies to assist in the construction of facilities at Providence Hospital, which was under the care of an Order of Roman Catholic Sisters, 29 Stat. 655, 679.

Adjudication of the Establishment Clause has established the principle that historical practice is an important element in constitutional analysis, "the court properly looked to history in upholding legislative prayer." *Marsh v. Chambers*, 463 U.S. 783 (1983); property tax exemptions for houses of worship, *Walz v. Tax Commissioner*, 397 U.S. 664 (1970); and Sunday closing laws. *McGowan v. Maryland*, 366 U.S. 420 (1961). As Justice Holmes once observed "(I)f a thing has been practiced for

[8] See Trustees reports to the governor and legislature for the State of Maryland and to the City Council of Baltimore.

200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). *Wallace v. Jaffree*, 472 U.S. 38,80 (1985) (opinion of O'Connor, J. concurring in judgment). If, indeed, "a page of history is worth a volume of logic", *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), then it is clear that the delivery of social welfare services by sectarian agencies does not violate the Establishment Clause of the First Amendment.

C.

The history of the relationship between government and sectarian institutions in the delivery of social welfare services not only evidences a long standing practice, but also suggests the existence of a legally significant difference between aid for such services and aid for education. For a period of almost a hundred years, the courts, legislatures and constitutional conventions have treated education as distinct from social services.

For example, the New York State Constitutional Convention of 1894 adopted a provision which prohibited appropriation of state money for sectarian educational institutions. Art. IX, Section 4, N.Y. Constitution of 1894. However, during that convention, extensive debate ranged over the question of whether a similar restriction should also be placed on sectarian charitable institutions. The result of this debate was the adoption of a separate section to the New York State Constitution which permitted state money to be paid to sectarian institutions engaged in certain social services.[9] Art. VIII, Section 14. Lincoln, Charles Z., *Constitutional History of New York* (*Lawyers*

[9] Article VIII, Section 14, was omitted from the New York Constitution of 1938 and and is not in the present constitution. The distinction between educational services and social services was, however, recognized in *Sargent v. Board of Education*, 177 N.Y. 317,69 N.E. 772 (1904).

Co-op., (1906) Vol. III, pp. 454-472, 560-579.

The Illinois State Supreme Court, which adopted the view that the provisions of its state constitution track the Establishment Clause rulings of the Federal Constitution, ruled that payments to sectarian social service agencies do not violate constitutional prohibitions. *Dunn v. Chicago Industrial School for Girls*, 280 Ill. Rptr. 614-619 (1917). *See also St. Hedwig's School v. Cook County*, 289 Ill. 432 (1919); *Trost v. Ketteler Manual Training School*, 282 Ill. 504 (1918).

The United States Supreme Court was faced with this distinction in a case arising out of the congressional support provided to Providence Hospital. In *Bradfield v. Roberts*, 175 U.S. 291 (1899), the complaint asserted that Providence Hospital was conducted under the auspices of the Sisters of Charity of Emmitsburg, Maryland, and that the Congress had no power to make the appropriation because it would be making a "law in favor of religious establishment." *Bradfield v. Roberts, supra*, at *297*

The Court held that the fact that the hospital was operated under the auspices of the church was wholly immaterial and did not serve to make a religious corporation out of a purely secular one.

> Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church. The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must however be managed, pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation. *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899).

Further, it must be noted that the distinction between educational and social service agencies is evident today in many of the state constitutions throughout the country. The recognition of these distinctions manifests good and sufficient cause that the *Lemon* test not be applied with respect to sectarian related social service organizations.[10]

II.

The effort to establish and maintain the *Everson* "wall of separation" has been fraught with overwhelming difficulty. Chief Justice Rehnquist recently noted that the Establishment Clause decisions "have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier' which 'is not wholly accurate' and can only be 'dimly perceived'." *Wallace v. Jaffree*, 472 U.S. 38,107 (1985) quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

At the present time, two members of the Court have

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[10] The Florida Constitution under Art. 1, Section 3, states "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution". The State Supreme Court has recognized that this section does not prohibit the state from promoting the general welfare, *Nohrr v. Brevard County Education Facilities Authority* 247 So. 2nd (1971).

The Virginia Constitution prohibits aid to sectarian institutions under Art. 4, Section 16, but the same section permits counties or cities to make contracts with any institution dealing with special welfare. Virginia Statute 15.1-24 provides in pertinent part that this section "shall not be construed to prohibit any counties or cities from making contracts with any sectarian institution for the care of indigent, sick, or injured persons".

openly rejected the *Lemon* test. In one instance, *Lemon* was never accepted (*Lemon v. Kurtzman*, 403 U.S. 602, 664, White dissent), and in the other instance, the *Lemon* test was rejected as an improper reading of the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38,91 *et seq.* (1985) (Rehnquist dissent).

A third Justice has found that the *Lemon* test has proven "problematic" and has suggested that "the standards announced in *Lemon* should be "reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment." *Wallace v. Jaffree*, *supra* p. 68 (opinion of O'Connor, J. concurring in judgment).

Given the history of plurality opinions and five-to-four decisions in cases involving the application of the Establishment Clause,[11] the views of these three Justices signal the need for fundamental revision of the Court's reading of the Establishment Clause. It is the view of the *amici* here that the Court should abandon both the *Lemon* test and the "wall of separation" doctrine set forth in *Everson v. Board of Education* because both precedents are deeply flawed.

Before this Court widens the impact of *Everson* and its progeny to include the delivery of social services, it would seem advisable to closely re-examine the predicates of those holdings. The *Everson* court grounded its opinion on the principle that "the First Amendment has erected a wall between church and state" and "that wall must be

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[11] The following were decided by plurality: *Tilton v. Richardson*, 403 U.S. 677 (1971); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736 (1976); *Wolman v. Walter*, 433 U.S. 229 (1977).

A majority of 5-4 decided the following cases: *Committee of Public Education v. Regan*, 444 U.S. 646 (1980); *Larson v. Valente*, 456 U.S. 228 (1982); *Mueller v. Allen*, 463 U.S. 388 (1983); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

kept high and impregnable". *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). The Court deduced certain axioms from this principle. The most pertinent of those with respect to the instant case is the injunction that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion." *Everson v. Board of Education*, *supra*, 16.

Jefferson's metaphor of the "wall of separation between church and state" is clearly hyperbole and cannot be taken seriously. As Justice O'Connor recently noted:

> "(C)hurch and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest often has an incidental or even primary effect of helping or hindering a sectarian belief. *Chaos would ensue if every such statute were invalid under the Establishment Clause. Wallace v. Jaffree*, 472 U.S. 38,70 (1985) (emphasis supplied.)

The Court recognized in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) that "total separation is not possible in an absolute sense" [and] "some relationship between government and religious organizations is inevitable." Organized religion has institutional interaction with government because "(n)o significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." *Lynch v. Donnelly*, 465 U.S. 668,673 (1984), citing *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). Moreover, this Court has repeatedly held that the Constitution does not require complete separation of church and state, "It [the Constitution] affirmatively mandates accommoda-

tion, not merely toleration, of all religions, and forbids hostility towards any." *Lynch v. Donnelly, supra*, p.674 citing *Zorach v. Clausen*, 343 U.S. 306, 314, 315 (1952); *McCollum v. Board of Education*, 333 U.S. 203, 211 (1948).

Thus, on an institutional level, this Court has never accepted "the wall of separation" as a reality despite the rhetorical references which have appeared in the dicta of Establishment Clause decisions over the years. In truth, the question has never been one of separation, but rather, how to manage the interaction between organized religion and government.

The *Everson* doctrine of separation has another dimension which is seldom mentioned despite its significance. This is the impact of the separation doctrine on the religious experience of the individual citizen. This factor is particularly important in the instant case since much of the lower court's decision is predicated upon the fact that the providers engaged in the delivery of the social services at issue here are committed to ethical principles and conduct. *Bowen v. Kendrick* 657 F. Supp. 1547, 1563-66 (D.D.C., 1987).

The decisions in both *Everson* and *Lemon* are grounded on the notion that it is possible to segregate the various activities of life into abstract but clearly separate categories. This fallacy is not uncommon. We often speak of a political life, an economic life, an emotional life, a sex life, as if these are disembodied realities. In truth, there is no such thing as an isolated political life, economic life, or sex life. There is only one life. All of these are human activities which function and operate coincidentally.

A legal system which attempts to insist that these elements exist apart from one another is doomed to hopeless confusion. Law exists in the space between persons and has no existence apart from human life.

The experience of religion is one of the fundamental and universal realities of human existence. Every human

being regardless of culture, race, or time has had to or will confront the fundamental questions of the meaning of life. Regardless of the reaction, all confront the question.

Neither "government" nor "religion" has an independent existence. Both exist only as activities of human persons. We cannot separate religion from government because we cannot slice up the human persona. Religion goes forward at the same time and through the same bodies and persons that carry on the economic and political life of the country.

The doctrine of "symbolic link" which first appeared in *Grand Rapids v. Ball*, 473 U.S. 373 (1985), and the concept of endorsement put forth by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668,690 (1984), are attempts to fashion a constitutional theory of adjudication which requires religious experience to be "factored out" of human activity.

The net result of such an approach is not only to isolate and segregate the religious experience but also to isolate and segregate those in our society who profess publicly to a religious or ethical conduct. *Everson* and *Lemon* ultimately lead down a slippery slope to judicially imposed hostility towards religion and its practitioners. Ironically, the same effect, when imposed by the legislative or executive branches of government has been held to violate the Free Exercise guarantees of the First Amendment, *McDaniel v. Paty*, 435 U.S. 618 (1978); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall* 357 U.S. 513 (1958).

Examination of the lower court decision in the instant case manifests the effects of *Everson* and *Lemon*. All parties to the present action, including the court below, concede that the AFLA has a legitimate secular purpose. All grantees under the statute, including sectarian related organizations, are performing a recognized service of public benefit. Nevertheless, the court below repeatedly makes reference to the fact that the various sectarian related

organizations which received grants under the AFLA manifested the intent to act according to princ'ples and to conduct themselves in keeping with their ethical standards. *Bowen v. Kendrick, supra,* 1563-66. At bottom, the gravamen of the complaint and the lynchpin of the decision of the court below are that the subjective motivation of the providers of this service renders the otherwise acceptable service constitutionally invalid.

It is well-established through long precedent that the First Amendment is intended to regulate conduct rather than belief *Reynolds v. U.S.* 981 U.S. 145 (1879); *Cantwell v. Connecticut* 310 U.S. 296 (1940); yet, in this instance, it is not conduct that the plaintiffs object to, it is the motivation for the conduct that causes concern.

Through the AFLA, government seeks to use sectarian related groups to counsel adolescents regarding premarital sex. The providers do indeed provide such counseling, which all parties agree is a legitimately secular activity. But the court below and the appellees here have made subjective feelings, emotions, and motivations into Constitutional significance. This approach is primitive and unsophisticated. All human activity is fraught with layers of judgments, senses, motivations, which in some cases are in conflict with each other.

The motivation of the *amici* in providing the social and medical services noted above[12] is rooted in the Gospel injunctions and the commitment to the dignity of the human person. Identical motivations and commitments to ethical standards are also present in programs such as those funded by the Alcohol, Drug Abuse & Mental Health Grant, 21 U.S.C. Sec. 1001 *et seq.* or the Child Abuse and Neglect Act, 42 U.S.C. Sec. 5101 *et seq.* or Emergency Shelter under the Community Development Block Grant, 42

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[12] See pp. 3-4.

U.S.C. Sec 5301 *et seq.* The decision of the court below would render all of these services Constitutionally infirm primarily because of the motivation of the providers.

The innuendo at work in both the complaint and in the decision of the court below is that sectarian grantees do things with the program funds other than provide the services required under the contract. Much is made of the "potential" for abuse. This "potential" is coupled with the entanglement theory of present Establishment Clause jurisprudence. "The courts have required aid to parochial schools to be closely watched lest money be put to sectarian use, yet this close supervision will create an entanglement." *Wallace v. Jaffree,* 472 U.S. 38,109 (1985) (Dissent of Justice Rehnquist citing *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736, 768-769 (1976) (White, J. concurring in judgment).

There are several flaws in this reasoning. First, if the entanglement doctrine has any relevance to the First Amendment Religion Clauses at all, it makes more sense as a Free Exercise doctrine rather than a part of Establishment adjudication. It seems clear that sectarian institutions do, indeed, have First Amendment protection against intrusive government action, but "interference with religion should . . . be dealt with under the Free Exercise Clause". *Wallace v. Jaffree,* 472 U.S. 38,109 (1985) (dissent of Justice Rehnquist). This is because sectarian institutions are themselves the proper parties to determine whether government action is intrusive upon their institutional integrity. It is not necessary for the Court to protect churches from themselves. This is particularly true with respect to secular activies undertaken by sectarian related institutions.

Where a sectarian institution determines to accept government funding and to participate in a government program, it makes sense that the institution has also made the judgment that it must submit to supervision

of the discharge of the duties entrusted to it. These *amici* do not apprehend any limitation of their Free Exercise rights in being held accountable for the expenditures of government funds. Abuses of public trust by sectarian institutions should be policed in the same manner as any other institution which accepts government money.[13] Unfortunately, this common sense approach is foreclosed solely because of the *Lemon* doctrine.

The difficulty with the present state of Establishment Clause jurisprudence lies in the fact that the various tests adopted under *Everson* and *Lemon* are driven by vague and subjective criteria. The "patchwork quilt" of Establishment Clause decisions is not the product of a logical or coherent doctrine, but, rather, a manifestation of the absence of any principled method of adjudication. These are "decisions" looking for a principle. Subjective feelings are not an adequate basis for constitutional decision-making.

The notion that Establishment Clause values can be best served by a test of symbolic link or by an assessment of whether there has been an endorsement of religion involves the same subjective elements that have heretofore crippled Establishment Clause jurisprudence. Symbolic to whom and symbolic of what? In whose head does the symbolic link have to occur to create a constitutional violation?

Everson and *Lemon* do not provide the means necessary to serve the values of Establishment Clause of First Amendment. We submit that the question is not, as set forth in *Everson*, how to keep government and religion separate; rather, the question is how to ensure that the

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[13] The contract signed by Catholic Charities U.S.A. as a grantee under the AFLA provides under item 7 of the Terms and Conditions, "The grantee will not teach or promote religion in the AFL Title XX program. The program shall be designed so as to be, to the extent possible, accessible to the public generally."

inevitable interaction between the political life and the religious life of the people of the United States can be made positive for the commonweal.

It is the view of these *amici* that the proper framework for Establishment Clause analysis was set forth by Justice White in his dissent in *Lemon*. *Lemon v. Kurtzman*, 403 U.S. 602, 664 (1971).

> It is enough for me that the States and the Federal Government are financing a separable, secular function of overriding importance in order to sustain the legislation here challenged.

Proper Establishment Clause adjudication can be accomplished by resolution of the question of whether or not there is a legitimate public purpose in the contested government action. It is our belief that any concept of endorsement is in fact subsumed under the public purpose doctrine. If, indeed, there is a public purpose to be achieved by the action of government then, by definition, there cannot be an unlawful endorsement of religion. Such analysis provides a clear and objective focus for adjudication and does not rely upon subjective elements for its application.

CONCLUSION

We urge the court to turn away from the *Everson* and *Lemon* doctrines. Judicial reaction to symbolism, feelings about endorsement, potential for abuse, and entanglement are ultimately not grounded in reason. It is possible, with reason, to understand whether a particular government program has a public purpose. We can see, for example, that shelter for the homeless, and food for the elderly are a public good. Reason also tells us that the public would benefit from counsel to minors to avoid premarital sexual relations. These realities, are the proper footing for Establishment Clause adjudication.

Respectfully submitted,

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